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Criminal Procedure: The Seventh Circuit's Current Approach

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CRIMINAL PROCEDURE: THE SEVENTH CIRCUIT'S CURRENT APPROACH

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The United States Court of Appeals for the Seventh Circuit decided numerous criminal cases during the past year.[1] While no single case stands out, a number of areas of uncertainty were clarified by the court.

This article offers a general view of current issues in federal criminal procedure in the Seventh Circuit. Only a small portion of the court's published[2] opinions relating to criminal procedure are discussed. This article is intended to be more informative than analytical, and is intended to direct the attention of the criminal lawyer engaged in active federal litigation to recent cases from this circuit.

The organization of this article follows the chronology of the criminal process, beginning with eyewitness identification and concluding with sentencing and appeal. Some general comments about acknowledged fundamental principles of criminal procedure are offered at the beginning of individual sections, as an aid to the discussion of the Seventh Circuit's work.[3]

EYEWITNESS IDENTIFICATION

Eyewitness identification of a defendant is often the most crucial

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1. This article examines cases decided by the United States Court of Appeals for the Seventh Circuit for the period of September 1, 1977, to May 31, 1978. Certain opinions issued after May 31, 1978, involving rehearing of earlier opinions, are also discussed.

Between September 1, 1977 and May 31, 1978, a total of 1144 appeals, both civil and criminal, were filed in the Seventh Circuit, out of which there were 961 dispositions. With respect to criminal appeals alone, 245 were filed and 190 were terminated. Interview with Hon. Thomas F. Strubbe, Clerk of the United States Court of Appeals for the Seventh Circuit (Nov. 11, 1978).

2. A large number of opinions, particularly criminal opinions, are issued pursuant to Circuit Rule 35, which forbids the citation of such opinions as authority. Obviously, this article only discusses published opinions.

3. This article will not include a discussion of decisions involving substantive issues of criminal law.

aspect of criminal proceedings.[4] In the trilogy of *United States v. Wade*,[5] *Gilbert v. California*,[6] and *Stovall v. Denno*,[7] the United States Supreme Court articulated an outline of the sixth amendment guarantee of the right to counsel in the context of eyewitness identification.

In *Wade*, the Supreme Court held that a post-indictment lineup is a "critical" stage of the prosecution during which a defendant is entitled, under the sixth amendment, to the assistance of counsel.[8] In the *Gilbert* case, the Court held that evidence of an identification of the defendant made at a post-indictment lineup in the absence of the defendant's counsel was inadmissable without a voluntary and intelligent waiver by the defendant.[9] In *Stovall*, the Court stated that "a claimed violation of due process in the conduct of a confrontation depends on the totality of the circumstances surrounding it."[10] However, there is no sixth amendment right to counsel at a lineup held before the initiation of adversary proceedings.[11]

The Supreme Court stated in *Neil v. Biggers*[12] that the "central question . . . was whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive."[13] And in the recent case of *Manson v. Brathwaite*,[14]

4. Stovall v. Denno, 388 U.S. 293 (1967); Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967). *See generally* Grano, Kirby, Biggers & Ash, *Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?* 72 MICH. L. REV. 717, 790-97 (1974) [hereinafter cited as Grano]; Pulaski, *Neil v. Biggers: The Supreme Court Dismantles the Wade Trilogy's Due Process Protection*, 26 STAN. L. REV. 1097, 1113-19 (1974) [hereinafter cited as Pulaski]. *See also Circuits Note: Criminal*, 66 GEO. L.J. 201, 324-531 (1977) [hereinafter cited as 1977 Circuits Note], for a thorough discussion of this subject.

5. 388 U.S. 218 (1967).

6. 388 U.S. 263 (1967).

7. 388 U.S. 293 (1967). *Wade*, *Gilbert* and *Stovall* were announced on the same day. *See generally* 1977 Circuits Note, *supra* note 4, at 324-32.

8. 388 U.S. at 241. Due process standards also control the admission of identification made in post-indictment stages that are not critical stages of the prosecution. United States v. Ash, 413 U.S. 300, 317, 320-21 (1973).

9. 388 U.S. at 273.

10. 388 U.S. at 302. The court ruled that despite the defendant's assertion that due process was violated by an identification procedure which was unnecessarily suggestive, the totality of the circumstances must be considered, and in this case, the necessity of holding the identification in a hospital room superseded the defendant's claim to the usual police line-up. *Id.* at 301-02.

11. Kirby v. Illinois, 406 U.S. 682, 689-90 (1972). Coleman v. Alabama, 399 U.S. 1, 7-9 (1970).

12. 409 U.S. 188 (1972).

13. *Id.* at 198-99 (citing Simmons v. United States, 390 U.S. 377, 384 (1968)). The *Biggers* Court enunciated five factors to be used to determine the reliability of the identification: the witness' opportunity to view the criminal at the time of the offense; his degree of attention during the crime; the accuracy of his prior descriptions of the criminal; the level of certainty he exhibited at the confrontation; and the length of time between the crime and confrontation. 409 U.S. at 199-200. *See also* 1977 Circuits Note, *supra* note 4, at 324-31. *See generally* Grano and Pulaski, *supra* note 4.

14. 432 U.S. 98 (1977).

the Court concluded that the *Biggers* test also applied to post-*Stovall* identification.[15] The *Manson* Court explicitly rejected a *per se* exclusionary rule which focuses on the procedures employed, and approved an approach which considers the totality of circumstances.[16]

During the past year, the United States Court of Appeals for the Seventh Circuit decided two cases involving significant eyewitness identification issues, *Jones v. Wisconsin*[17] and *United States ex rel. Moore v. Illinois*.[18] *Jones* arose from the habeas corpus petition of a defendant who had pleaded guilty and had been convicted of armed robbery. Jones had pleaded guilty after the admission of two in-court identifications.[19] The Seventh Circuit found that the district court had properly assessed both in-court identifications in light of *Neil v. Biggers*, and that one of the identifications had been tainted by improper identification methods.[20] The *Jones* court agreed with the district court's conclusion that the fourth *Biggers* test—the certainty demonstrated by the witness at the confrontation—was not met by the first witness, who had had numerous opportunities to observe and identify the defendant, but did not do so until after he had received frequent improper suggestions to do so.[21] The *Jones* court also upheld the district court's conclusion that a second witness' identification was properly admitted, since the witness promptly identified the defendant each time he had an opportunity to view him.[22] The case was reversed

15. *Id.* at 107.

16. *Id.* at 114. The *Manson* majority concluded that the witness's ability to make an accurate identification outweighed the suggestiveness of the identification. The Court cited with approval Kirby v. Sturges, 510 F.2d 397, 403-04, 407 (7th Cir.), *cert. denied*, 421 U.S. 1016 (1975), in which the Seventh Circuit concluded that under *Biggers* post-*Stovall* identifications should be assessed by using the totality of the circumstances. *See* Haddad, *Criminal Procedure and Habeas Corpus*, 52 CHI.-KENT L. REV. 294, 295 (1975) [hereinafter cited as Haddad]; Skinner, *Criminal Procedure*, 53 CHI.-KENT L. REV. 310, 311-14 (1976) [hereinafter cited as Skinner].

17. 562 F.2d 440 (7th Cir. 1977).

18. 577 F.2d 411 (7th Cir. 1978).

19. 562 F.2d at 441.

20. *Id.* at 443-44. Originally the district court had denied Jones's petition on the ground that he had waived his right to challenge the constitutional infirmities of his conviction by his guilty plea. On appeal, the Seventh Circuit reversed and remanded, holding that under Lefkowitz v. Newsome, 420 U.S. 283 (1975), Jones was entitled to the same remedies in a federal habeas corpus action as exist in the state courts of Wisconsin. 562 F.2d at 441.

21. The first witness had observed the defendant accompanied by a police officer in a lineup in which the defendant was the only black. In addition, the first witness observed the second witness make a positive identification and overheard the police tell the defendant he had failed a polygraph examination. The *Jones* court concluded that such hesitance could not be equated with "a natural and proper reluctance to misidentify an innocent party." *Id.* at 442-43. The court also discussed Israel v. Odom, 521 F.2d 1370 (7th Cir. 1975), in which the court had accepted the reliability of a thoughtful witness who displays initial caution before making a commitment to a definite identification.

22. 562 F.2d at 444-45.

on other grounds.[23]

United States ex rel. Moore v. Illinois[24] was considered by the Seventh Circuit on remand from the United States Supreme Court.[25] The Supreme Court had reversed a Seventh Circuit judgment affirming a district court's denial of habeas relief.[26] The Supreme Court found that the defendant's right to counsel had been violated by an identification of the defendant made in the absence of counsel after the initiation of adversary proceedings. The Court held that such identification was *per se* excludable[27] under *Gilbert v. California*.[28] The case was remanded to the Seventh Circuit to determine whether the admission of the in-court identification was harmless error.[29] The Seventh Circuit decided that the resolution of that issue depended on two separate inquiries: (1) whether the identification was reliable even though the pretrial confrontation was suggestive; and (2) whether the in-court identification was independent of the uncounseled pretrial confrontation.[30] The Seventh Circuit then found the identification to be both reliable and based on a source independent of the suggestive pretrial identification.[31] The court based its finding on the "totality" of the circumstances, but emphasized the "moral certitude" of the victim witness.[32]

Arrest, Search and Seizure

The principles of the fourth amendment protections against unreasonable searches and seizures are well settled and will not be detailed here.[33] The United States Supreme Court underscored those principles in *Katz v. United States*[34] and *Mapp v. Ohio*[35] when it held that, under the fourth amendment, an individual's reasonable expectation of privacy in his person and property is protected from unreasonable govern-

23. The court held that under Wisconsin law Jones's guilty plea must be vacated because one witness's identification was improperly admitted. *Id.* at 445-46.

24. 577 F.2d 411 (7th Cir. 1978).

25. Moore v. Illinois, 434 U.S. 220 (1977).

26. 534 F.2d 331 (7th Cir. 1976).

27. 434 U.S. at 231.

28. 388 U.S. 263 (1967).

29. 434 U.S. at 232.

30. 577 F.2d at 412-13. The opinion also discusses whether the failure to provide the defendant with a transcript of the preliminary hearing constituted prejudicial error.

31. *Id.* at 413.

32. *Id.* at 415-16.

33. *See generally* LaFave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth,"* 1966 U. ILL. L.F. 255; 1977 Circuits Note, *supra* note 4, at 247-98; Skinner, *supra* note 16, at 323-31; Haddad, *supra* note 16, at 298-301.

34. 389 U.S. 347 (1967).

35. 367 U.S. 643 (1961).

mental intrusions.[36] In *United States v. Chadwick*,[37] the Supreme Court reaffirmed the principle that exceptions to the fourth amendment's requirement that warrants issue only upon a showing of probable cause are to be strictly construed.[38] And in *United States v. Watson*,[39] the Court stated that the fourth amendment had long been interpreted to "reflect the ancient common law rule that a peace officer was permitted to arrest without a warrant . . . if there was reasonable grounds for making the arrest."[40]

The United States Court of Appeals for the Seventh Circuit dealt with an arrest issue during this past year in *United States v. Fernandez-Guzman*.[41] In that case the court held that an examination of the sufficiency of probable cause to arrest was not limited to the four corners of a Rule 5(a)[42] complaint filed subsequent to an arrest.[43] The *Fernandez-Guzman* court found that the complaint in that case failed, on its face, to show probable cause to arrest.[44] The court concluded that the district court did not err in conducting an evidentiary hearing on the probable cause which went beyond the Rule 5(a) complaint.[45]

In the area of searches, the Seventh Circuit encountered a number of intriguing issues. In *United States v. Mendel*,[46] the district court had suppressed evidence seized pursuant to a search warrant that incorporated a tape recording of an agent's sworn statement before a magistrate. The search warrant detailed the place to be searched, but instead of containing a written statement of the facts establishing probable cause, the warrant merely referred to the tape recording.[47] The recording had been made by the agent, under oath and in the presence of the magistrate, and contained the magistrate's questions and the agent's

36. 389 U.S. at 353; 367 U.S. at 660. *See* 1977 Circuits Note, *supra* note 4, at 247.
37. 433 U.S. 1 (1977).
38. *Id.* at 9.
39. 423 U.S. 411 (1976). *See generally* Note, *Watson & Santana: Death Knell for Arrest Warrants?* 28 SYRACUSE L. REV. 787 (1977).
40. 423 U.S. at 418. *See also* Gerstein v. Pugh, 420 U.S. 103, 113 (1975).
41. 577 F.2d 1093 (7th Cir. 1978). The Seventh Circuit decided several other cases related to probable cause, which merely restated prior law. *See, e.g.*, United States v. Holleman, 575 F.2d 139 (7th Cir. 1978); Meiners v. Moriarty, 563 F.2d 343 (7th Cir. 1977).
42. Fed. R. Crim. P. 5(a) provides, in relevant part:

> An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041.

43. 577 F.2d at 1096.
44. *Id.*
45. *Id.* at 1100.
46. 578 F.2d 668 (7th Cir. 1978).
47. *Id.* at 669.

answers.[48] The district court suppressed the fruits of the search because the sworn statement was not set out in the affidavit pursuant to Rule 41(c) of the Federal Rules of Criminal Procedure.[49] The Seventh Circuit reversed, holding that the district court's ruling was unduly narrow, and commenting that the 1972 amendment to Rule 41(c) "evidences an intention that a recorded sworn oral statement by the affiant made in the presence of the magistrate should be considered part of the affidavit."[50] The *Mendel* court pointed out that the law generally prefers spontaneous oral testimony to written affidavit.[51] The court also noted with approval the fact that oral presentation made it possible for the magistrate to explore incomplete or ambiguous points in the written affidavit.[52]

The Seventh Circuit Court of Appeals also dealt with numerous warrantless search cases. For example, in *United States v. Richardson*,[53] the court upheld the consent search of a closet which uncovered clothing worn in a bank robbery. The closet was in an apartment jointly occupied by the defendant and another individual. Richardson argued that his co-tenant's consent to the search was ineffective, because the closet was exclusively used by Richardson. But the Seventh Circuit held that Richardson assumed the risk that his co-tenant would allow someone to search a closet which was part of their jointly occupied bedroom.[54]

In *United States v. Simmons*,[55] the court of appeals considered the search incident to arrest doctrine as it applied to the companions of arrested defendants. Following a bank robbery by two armed men, the authorities arrested co-defendant Pastore, who implicated Simmons and offered information which led the police and the FBI to Simmons' hotel. Upon arriving at the hotel, the FBI and police proceeded to Simmons' room without a warrant. When the defendant opened the door, he was immediately arrested and removed from the room. Simultaneously, two officers entered the small room and observed a naked woman standing near the bed. One officer reached for something to cover the woman. The other officer noticed a bulge on the bed

48. *Id.*
49. *Id.* at 670. Fed. R. Crim. P. 41(c) provides in relevant part:

> A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant.

50. *Id.* at 670-71.
51. *Id.* at 672.
52. *Id.*
53. 562 F.2d 476 (7th Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978).
54. *Id.* at 479-80.
55. 567 F.2d 314 (7th Cir. 1977).

which he discovered was a bag containing United States currency. The second officer observed a purse within the reach of the woman; he emptied its contents onto the bed, and discovered a replica of a gun.[56]

At his trial, Simmons argued that while there was probable cause to arrest him, there was no probable cause to search the bed. The Court of Appeals for the Seventh Circuit upheld the search, citing *United States v. Berryhill*[57] in support. The court rejected the government's contention that the rationale of *Terry v. Ohio*,[58] which allows limited intrusions of one's privacy by an officer, applied to searches of the area within the arrestee's companion's control. However, the Seventh Circuit found the search of the companion's immediate area reasonable in light of the officer's belief that a dangerous situation might have existed.[59] The *Simmons* court was careful to note that it was advocating neither an extension of *Terry*, nor wholesale searches of areas within the immediate control of all persons present during an arrest.[60] Rather, the court was approving such searches "when an objective probability of danger exists under the circumstances."[61]

In dissent, Judge Swygert, citing *Chimel v. California*[62] and *United States v. Chadwick*,[63] suggested that the warrantless search was not reasonable under the circumstances. Judge Swygert pointed out that the defendant had been taken from the room, leaving several officers and a nude woman.[64] Under those circumstances, Judge Swygert argued, there existed no clear and present danger to the officers that justified the search.[65]

56. *Id.* at 316.

57. 445 F.2d 1189, 1192-93 (9th Cir. 1971). In *Berryhill*, the United States Court of Appeals for the Ninth Circuit held that officers, acting pursuant to a valid search warrant, who arrested the defendant in an automobile, were constitutionally permitted to conduct a limited search of the occupants of the automobile for the officers' own protection.

58. 392 U.S. 1 (1968). The United States Supreme Court held in *Terry* that an officer who is justified in believing that an individual is armed and potentially dangerous may make a limited intrusion of that person's privacy in order to neutralize any threat of physical harm.

59. 567 F.2d at 318-19.

60. *Id.* at 320.

61. *Id.*

62. 395 U.S. 752 (1969). In *Chimel*, the United States Supreme Court held that a search of an individual's entire house exceeded the limits of a search incident to an arrest, and was unnecessary for the protection of the officers' safety. Accordingly, the Court held that the search violated the fourth amendment, and consequently reversed the defendant's conviction, which was based on the fruits of that search.

63. 433 U.S. 1 (1977). The *Chadwick* Court held that a search, without a valid search warrant, of a double-locked footlocker almost two hours after the defendant's arrest was unreasonable, and the evidentiary fruits therefrom were inadmissible at the defendant's trial. The Court found none of the exigent circumstances present which would authorize such a search, since the officers were not fearful for their safety, nor was there a possibility that the evidence would be lost.

64. 567 F.2d at 322.

65. *Id.*

In *United States v. Berry*,[66] the Seventh Circuit also had occasion to consider the impact of *United States v. Chadwick*,[67] in which the United States Supreme Court held that a warrantless search of a footlocker at the time of arrest violated the fourth amendment. The *Chadwick* Court distinguished the warrantless searches that had been upheld in *United States v. Robinson*[68] and *United States v. Edwards*.[69] The Seventh Circuit interpreted the *Chadwick* decision to allow searches of arrestee's clothing and pockets as searches of the person, because such searches, as opposed to that of a footlocker, do not involve any greater reduction in the arrestee's expectation of privacy than that caused by the arrest itself.[70]

Berry involved the search of an attache case following the arrest and handcuffing of a suspected bank robber.[71] The district court denied the defendant's motion to suppress the search. The *Berry* case was briefed and argued before the Seventh Circuit prior to the issuance of the *Chadwick* decision.[72] The court of appeals, citing *Chadwick*, reversed the district court's denial of the motion to suppress.[73] Judge Bauer, writing for the court, found the arrestee's privacy interest in the attache case to be as great as the privacy interest which the Supreme Court found that Chadwick had in the footlocker.[74] The *Berry* court distinguished the attache search from the search of a purse, concluding that the attache search could not be justified as a search incident to arrest because there was no danger that the arrestee would gain access to the case in order to seize a weapon or destroy evidence.[75]

Upon rehearing, the Seventh Circuit decided that the exclusionary rule should not be applied to pre-*Chadwick* searches.[76] In light of the fact that various pre-*Chadwick* decisions had upheld warrantless searches of briefcases or packages seized from arrestees after they had been taken into custody, the panel could not say that law enforcement officials were properly charged with the knowledge that the search of the attache case was unconstitutional.[77] Thus, the court declined to ap-

66. 560 F.2d 861 (7th Cir. 1977), *vacated*, 571 F.2d 2 (7th Cir. 1978).
67. 433 U.S. 1 (1977). *See generally* 6 AM. J. CRIM. L. 81 (1978).
68. 414 U.S. 218 (1973) (search of arrestee's pockets).
69. 415 U.S. 800 (1974) (search of arrestee's clothing).
70. 560 F.2d at 863-64.
71. *Id.* at 862-63.
72. *Id.*
73. *Id.* at 864-65.
74. *Id.* at 864.
75. *Id.*
76. 571 F.2d 2 (7th Cir. 1978).
77. *Id.* at 3.

ply *Chadwick* retroactively and vacated its earlier reversal.[78]

In one of its more intriguing search and seizure decisions, *United States v. Shelby*,[79] the Court of Appeals for the Seventh Circuit addressed the issue of an individual's reasonable expectations of privacy in trash.[80] The defendant was a former employee of a janitorial company that serviced a number of banks. The defendant had obtained a set of keys, which he used to enter various banks after hours and steal coins. After the defendant had deposited large numbers of coins at another bank, the FBI requested the local sanitation department to watch for coin wrappers and trays in the trash outside Shelby's residence. The sanitation workers removed Shelby's trash bins from his property in the normal course of trash collection and dumped them into a truck. Several blocks away, the workers examined the contents of the large plastic bags that had been in Shelby's trash cans and discovered coin wrappers and trays. These findings led to the issuance of a search warrant.[81]

On appeal of his conviction, Shelby argued that he had a reasonable expectation of privacy in his trash, since he contemplated that the trash would be collected and ultimately destroyed. Judge Wood called this expectation "totally unrealistic, unreasonable, and in complete disregard of the mechanics of its disposal."[82] The court went on to explicitly reject the "selective abandonment" rationale expressed by the California Supreme Court in the celebrated case of *People v. Krivda*.[83] In so doing, the Seventh Circuit followed the position taken by the majority of federal courts.[84]

STATEMENTS, ADMISSIONS AND CONFESSIONS

The fifth amendment provides that "no person . . . shall be com-

78. *Id.*
79. 573 F.2d 971 (7th Cir. 1978).
80. *See generally* 1977 Circuits Note, *supra* note 4, at 247 n.1.
81. 573 F.2d at 972-73.
82. *Id.* at 973.
83. 5 Cal. 3d 359, 369, 486 P.2d 1262, 1269, 96 Cal. Rptr. 62, 70 (1971), *vacated*, 409 U.S. 33 (1972), *reaff'd*, 8 Cal. 3d 623, 504 P.2d 457, 105 Cal. Rptr. 521, *cert. denied*, 412 U.S. 919 (1973). The *Krivda* court upheld the lower court's suppression of evidence obtained from the defendant's garbage cans. The court held that the mere placement of a person's trash barrels on a public sidewalk is not abandonment thereof. The court then held that these defendants, by their actions, retained an expectation of privacy and that this expectation was reasonable under the circumstances.
84. *See* United States v. Mustone, 469 F.2d 970 (1st Cir. 1972) (no privacy in contents of trash bags placed several doors away from his office); United States v. Stroble, 431 F.2d 1273 (6th Cir. 1970) (empty carton and attached card lying beside two garbage cans near curb were not protected by fourth amendment). *Contra*, Work v. United States, 243 F.2d 660 (D.C. Cir. 1957) (seizure of phial from closed trash can under porch invalidated).

pelled to be a witness against himself."[85] In *Miranda v. Arizona*,[86] the United States Supreme Court held that statements made during custodial interrogations were inadmissible unless law enforcement officials followed procedures which assured that the defendant was accorded his privilege against self-incrimination.[87] The *Miranda* procedures apply to all custodial interrogations.[88]

In *White v. Finkbeiner*,[89] the Court of Appeals for the Seventh Circuit considered the issue of voluntariness in light of alleged violations of *Miranda*. White was convicted in state court of murder, largely on the basis of his confession and testimony regarding his reenactment of the crime following his confession. White's motion to suppress his confession was denied. White appealed to the Appellate Court of Illinois, which remanded for a full evidentiary hearing.

At the hearing, the interrogating officer testified that White had been advised of his *Miranda* rights orally and had waived those rights in writing. However, there was also unequivocal testimony by the watch commander to whom White had first been brought following his arrest, that White had requested an attorney. White was questioned a number of times; he finally confessed on the third day after his initial arrest.[90] The trial court again found that the defendant had been properly admonished.

On direct appeal, a majority of the Illinois appellate court concluded that, since White had failed to offer any evidence to contradict the final testimony, in fact he had not asked for an attorney. Thus, the appellate court viewed the issue to be whether a defendant who manifested an initial unwillingness to talk could be interrogated later after being readvised of his rights.

One justice of the appellate court dissented, arguing that the record demonstrated that White had asked for counsel, and, therefore, all

85. U.S. CONST. amend. V. *See generally* 1977 Circuits Note, *supra* note 4, at 333-51.

86. 384 U.S. 436 (1966).

87. Those procedures include the following: (1) The defendant must be informed in clear and unequivocal terms that he has the right to remain silent. *Id.* at 467-68. (2) The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be held against the individual in court. *Id.* at 469. (3) The individual must be told that he has the right to consult with counsel and have counsel present during the questioning. *Id.* at 469-70. (4) The individual must be told that if he cannot afford counsel, one will be appointed for him. *Id.* at 473. (5) If the individual expresses a desire to end the interrogation, it must end immediately. *Id.* at 474. (6) If the individual states that he wishes an attorney, the interrogation must cease until an attorney is present. *Id.* at 474.

88. *Id.* at 477-78.

89. 570 F.2d 194 (7th Cir. 1978).

90. *Id.* at 196-98.

subsequent statements were inadmissible under *Miranda*.[91] On appeal, the Illinois Supreme Court adopted the view of the dissenting appellate court justice, concluding that White had requested a lawyer.[92] The state supreme court ruled, however, that the effect of the *Miranda* violations was so dissipated by lapse of time, repeated admonitions and other intervening agents, that the defendant's confession was voluntary.[93]

White then sought federal habeas corpus relief, but his petition was denied by the district court without an evidentiary hearing. On appeal from that decision, the Court of Appeals for the Seventh Circuit ruled that the district court had erred in denying White's habeas petition without a hearing.[94] The Seventh Circuit said that an evidentiary hearing was required where the trial court had failed to decide the crucial issue of whether White indeed had asked for a lawyer when he was first brought to the police station.[95] Thus, the Seventh Circuit was unable to determine the basis for the state court's finding of voluntariness.

The Seventh Circuit court did indicate that even if a violation of *Miranda* had occurred, it was not certain that the subsequent statements would automatically fall.[96] The *White* court left open the possibility that the state could meet the "heavy burden"[97] of showing that White at a later time had waived his rights to counsel. However, the court was unwilling to decide whether the reasoning of *Stone v. Powell*[98] prevented the court from granting habeas relief for an alleged *Miranda* violation which had been fully and fairly litigated in state courts.[99]

In *United States ex rel. Henne v. Fiske*,[100] the Seventh Circuit recently had occasion to consider the effect of another United States Supreme Court decision limiting federal habeas relief for state prison-

91. People v. White, 22 Ill. App. 3d 180, 187, 317 N.E.2d 323, 328 (1974), *cert. denied*, 424 U.S. 970 (1976).

92. People v. White, 61 Ill. 2d 288, 293-94, 335 N.E.2d 457, 461 (1975), *cert. denied*, 424 U.S. 970 (1976).

93. 61 Ill. 2d at 297, 335 N.E.2d at 463.

94. 570 F.2d at 199.

95. *Id.* at 200.

96. *Id.* at 200-01.

97. *Id.* at 202.

98. 428 U.S. 465 (1976). Where the state has provided an opportunity for full and fair litigation of a fourth amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. *Id.* at 494. *See generally* Note, *Stone v. Powell: The End of Collateral Review for Fourth Amendment Claims by State Prisoners?* 13 CAL. W.L. REV. 558 (1977).

99. 570 F.2d at 201.

100. 563 F.2d 809 (7th Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978). The court's opinion in *Henne* was originally issued on August 2, 1977 as an unpublished order pursuant to Local Circuit Rule 35. The court later decided to publish the order.

ers, *Wainwright v. Sykes*.[101] In *Wainwright*, the Supreme Court had held that where, under state law, a defendant was required to challenge the admissibility of his confession at trial or not at all, review of the issue on federal habeas corpus petition was barred "absent a showing of 'cause' and 'prejudice,' attendant to [the] state procedural waiver."[102]

In *Henne*, the defendant was tried and convicted in state court of murder, following the admission of Henne's confession. Henne had been arrested for driving while intoxicated and was advised of his *Miranda* rights at that time. Henne was questioned the next morning and was merely asked if he knew his rights. Henne responded affirmatively and then made a number of incriminating statements. At trial, Henne moved to suppress his pretrial statements because allegedly he did not understand his *Miranda* rights.[103] After an evidentiary hearing, the trial court denied the motion. On direct appeal, the Appellate Court of Illinois considered the merits of Henne's *Miranda* claim and affirmed the conviction.[104] After concluding that Henne, unlike Sykes, had pressed the *Miranda* issue at trial and on direct appeal, the Seventh Circuit held that *Wainwright v. Sykes* did not bar Henne's federal habeas corpus petition.[105]

The *Henne* court next considered the "potentially far reaching issue"[106] of whether the Supreme Court's holding in *Stone v. Powell*[107] applied to fifth amendment claims. In *Stone*, the Supreme Court held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at trial."[108] Noting that in *Wainwright v. Sykes* the Supreme Court declined to consider whether *Stone* should be extended to claimed *Miranda* violations which had been litigated in the state court,[109] the Seventh Circuit concluded that it would not extend *Stone v. Powell* to exclude federal habeas corpus consideration of fifth amendment claims.[110] Addressing the merits of Henne's claim, the Seventh Circuit held that the district court's finding that Henne under-

101. 433 U.S. 72 (1977).
102. *Id.* at 87.
103. 563 F.2d at 811.
104. People v. Henne, 23 Ill. App. 3d 567, 319 N.E.2d 596 (1975).
105. 563 F.2d at 812.
106. *Id.*
107. 428 U.S. 465 (1976). *See* note 98 *supra*.
108. *Id.* at 482.
109. 563 F.2d at 812.
110. *Id.*

stood his rights and voluntarily waived these rights the next morning was not clearly erroneous, and therefore affirmed the lower court's denial of habeas relief.[111]

United States ex rel. Cooper v. Warden[112] also involved a state defendant's habeas attack on his state conviction for murder, robbery and burglary, based on his alleged mental incompetency to comprehend *Miranda* warnings.[113] Cooper had moved to suppress his confession before the state court because of his alleged mental incompetency.[114] The trial court denied the motion to suppress and the state appellate court affirmed on direct appeal.[115] The Seventh Circuit agreed with the district court's finding that in light of the substantial record rebutting Cooper's claim it had no alternative but to defer to the state court's determination that Cooper understood his rights.[116]

ELECTRONIC SURVEILLANCE

Title III of the Omnibus Crime Control and Safe Streets Act of 1968[117] provides a comprehensive plan regulating any electronic surveillance by any law enforcement agency of oral or wire communications. The Act sets forth precisely detailed requirements for applying for authorization to make an interception.[118] Any interceptions made in violation of the statute are inadmissible in any criminal proceeding, state or federal.[119] Upon expiration of time covered by the application, the law enforcement agency using the authorization must seal[120] the tapes and authorizing orders "immediately."[121]

In *United States v. Angelini*,[122] the Court of Appeals for the Seventh Circuit considered the effect of delays in sealing authorized tapes. In *Angelini*, three distinct authorizations were obtained. After termination of the recording, duplicate tapes were made and the originals were retained in secure storage. Delays in sealing occurred when the voluminous tapes were transcribed, because the typists frequently found it necessary to refer to the original tapes in order to prepare the tran-

111. The district court had viewed a video tape of Henne being questioned. *Id.* at 814.
112. 566 F.2d 28 (7th Cir. 1977).
113. *Id.* at 29.
114. *Id.*
115. People v. Cooper, 30 Ill. App. 3d 326, 332 N.E.2d 453, *cert. denied*, 425 U.S. 994 (1976).
116. 566 F.2d at 30.
117. 18 U.S.C. §§ 2510-2520 (1976). *See also* 1977 Circuits Note, *supra* note 4, at 299; 57 B.U.L. Rev. 587 (1977) (forcible entry to business premises to install court ordered wiretap).
118. 18 U.S.C. §§ 2516, 2518 (1976).
119. *Id.* § 2575. *See generally* Skinner, *supra* note 16, at 331-39.
120. 18 U.S.C. § 2518(8)(a).
121. *Id.*
122. 565 F.2d 469 (7th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978).

script.[123] The original tapes were sealed between nine and thirty-eight days after the end of the wiretaps.[124] At the district court suppression hearing, the district judge found no tampering with the tapes, and concluded that the government had acted in the best of faith and with no intent to circumvent the law.[125] However, the court suppressed the tapes because the government did not meet the statutory requirement of a "satisfactory" explanation, *i.e.*, that a sealing delay was "really necessary."[126]

In reversing the suppression order, the Seventh Circuit interpreted *United States v. Lawson*,[127] in which the court, after careful examination,[128] held that suppression was inappropriate for violation of various Title III procedures. As the *Angelini* court stated,[129] *Lawson* contemplates a two-step analysis. First, the district court must determine whether a satisfactory explanation has been offered for a delay. Second, if no satisfactory explanation has been offered, the district court must decide if the purpose for which the particular procedure was designed has been achieved despite the error.[130] In addition, the *Angelini* court held that the trial court must consider whether the statutory requirement was deliberately ignored.[131]

The *Angelini* court found that the government did offer a satisfactory explanation for the sealing delay, although it suggested alternative measures which might avoid such delay in the future.[132] The court also found no deliberate avoidance of the statutory requirements.[133]

Angelini clearly demonstrated the Seventh Circuit's commitment to examining congressional purposes behind the various procedures specified in the Omnibus Crime Control and Safe Streets Act. The court explicitly refused[134] to follow the Second Circuit's position in *United States v. Gigante*,[135] which held that a delay in sealing requires suppression without inquiry into the satisfaction of congressional purposes, absent a satisfactory explanation.

123. *Id.*
124. *Id.* at 470-71.
125. *Id.* at 471.
126. *Id.*
127. 545 F.2d 557 (7th Cir. 1975), *cert. denied*, 424 U.S. 927 (1976).
128. *Id.* at 562-65.
129. 565 F.2d at 471.
130. *Id.* at 471.
131. *Id.*
132. *Id.* at 472.
133. *Id.*
134. *Id.* at 472 n.7. The Seventh Circuit has also discussed wiretapping issues arising from grand jury proceedings in *In re* Lopez, 565 F.2d 407 (7th Cir. 1977), and *In re* Pavone, 570 F.2d 674 (7th Cir. 1978). *See* text accompanying notes 176-192 *infra*.
135. 538 F.2d 502 (2d Cir. 1976).

RIGHT TO COUNSEL

Applicability of Right to Counsel

The United States Supreme Court recently restated the sixth amendment[136] guarantee of the right to counsel after the initiation of adversary criminal proceedings in *Brewer v. Williams*.[137] The *Brewer* Court relied heavily on *Massiah v. United States*,[138] in which the Court held that admissions by the defendant to a government informant were inadmissible because the admissions were made after indictment in the absence of counsel.[139] The *Massiah* Court viewed the post-indictment statement to a government informant as analogous to an interrogation by government agents.[140]

In *United States v. Craig*,[141] the Seventh Circuit considered the right to counsel issue in the context of taped conversations. In *Craig*, members of the Illinois General Assembly were prosecuted for conspiracy and mail fraud resulting from bribes they had accepted to vote for legislation favorable to the cement industry. During the pre-indictment investigation, one of the legislators agreed to cooperate with the government and record his conversations with another implicated legislator. The defendant legislator whose conversations were taped ultimately was convicted.[142] On appeal, he argued that his sixth amendment rights to counsel had been violated because the government knew he had retained counsel.[143] The Seventh Circuit rejected the defendant's argument because, unlike in *Massiah*, no criminal proceedings had yet been initiated against the defendant.[144]

Effective Assistance of Counsel

In *United States ex rel. William v. Twomey*,[145] the Court of Appeals for the Seventh Circuit held that the standard for effective assistance of counsel required by the sixth amendment was whether defense counsel had met "a minimum standard of professional representa-

136. U.S. CONST. amend. VI provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

137. 430 U.S. 387 (1977). *See also* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972); Kirby v. Illinois, 406 U.S. 682, 688 (1972). For a discussion of *Brewer*, *see* Kamisar, *Foreword: Brewer v. Williams — A Hard Look at a Discomfiting Record*, 66 GEO. L.J. 209 (1977).

138. 377 U.S. 201 (1964).

139. *Id.* at 205-06.

140. *Id.* at 206.

141. 573 F.2d 455 (7th Cir. 1977), *cert. denied*, 47 U.S.L.W. 3221 (U.S. Oct. 3, 1978).

142. *Id.* at 462, 473.

143. *Id.* at 473.

144. *Id.* at 475.

145. 510 F.2d 634 (7th Cir. 1975).

tion."[146] That standard was reiterated this term in *United States ex rel. Rooney v. Housewright*.[147]

United States ex rel. Smith v. Pavich[148] presented the Seventh Circuit with the provocative issue of whether a defendant who chose to represent himself could thereafter complain that the quality of his own defense amounted to a denial of effective assistance of counsel. The court of appeals concluded that the Supreme Court explicitly held in *Faretta v. California*[149] that a defendant who makes a competent and knowing waiver of his right to professional counsel and chooses to represent himself cannot thereafter complain that he was denied effective assistance of counsel.

The Seventh Circuit considered whether the sixth amendment permitted a defendant to choose as his counsel a person unlicensed to practice law in *United States v. Taylor*.[150] The court concluded that neither the historical background of the sixth amendment nor the Supreme Court's decision in *Faretta* guaranteed a defendant a right to be represented by an unlicensed person. The *Taylor* court also concluded that the district court committed no error in appointing standby counsel for the defendant over the defendant's objections.

In *United States v. Gaines*,[151] a case decided in a prior term, the Seventh Circuit held that the sixth amendment guarantee of assistance of counsel includes the right to counsel "whose loyalties are not divided between clients with conflicting interests."[152] Last term, in *United States v. Kidding*,[153] the court of appeals held that primary responsibility for avoidance of a professional conflict of interest rests with the attorneys and not with the court.[154]

In another case decided this term, *United States ex rel. McClindon v. Warden*,[155] a state defendant who had been convicted of murder brought a federal habeas corpus petition alleging that his sixth amendment right to counsel had been violated because of the divided loyalties of his counsel. McClindon and his co-defendant Hubbard were tried jointly for the murder of one Leon Hunt. Testimony at the state trial

146. *Id.* at 641.
147. 568 F.2d 516, 520 (7th Cir. 1977).
148. 568 F.2d 33 (7th Cir. 1978).
149. 422 U.S. 806 (1975).
150. No. 77-1180 (7th Cir. June 12, 1978).
151. 529 F.2d 1038 (7th Cir. 1976). *See also* Note, *United States v. Gaines*, 53 NOTRE DAME LAW. 545 (1978).
152. *Id.* at 1043.
153. 560 F.2d 1303 (7th Cir. 1977).
154. *Id.* at 1310 (citing United States v. Mandell, 525 F.2d 671 (7th Cir. 1975), *cert. denied*, 423 U.S. 1049 (1976)).
155. 575 F.2d 108 (7th Cir. 1978).

established that both McClindon and Hubbard were observed entering an apartment bathroom and were heard to be arguing with the victim Hunt. Gunshots were fired and both McClindon and Hubbard were observed fleeing the apartment.[156] The district court held that under the facts adduced at trial, an attorney who met minimum standards of professional representation would not have undertaken the joint defense of McClindon and Hubbard.[157]

The Seventh Circuit disagreed with the district court and reversed and remanded for further evidentiary hearings.[158] The *McClindon* court relied on the defense counsel's testimony that McClindon, who had retained the attorney, had steadily maintained that he and Hubbard had acted in concert. Trial counsel also testified that McClindon had suggested that the attorney represent both defendants since both defendants would "either walk together or go down together."[159]

The *McClindon* court's analysis reiterates the Seventh Circuit's holding in *United States v. Mandell*[160] that common representation, absent evidence that conflict of interest actually exists, is not in itself a violation of the sixth amendment.[161] The court also emphasized the *Kidding* principle that the primary responsibility for avoiding professional conflicts lies with the bar and not with the bench.[162]

In *United States v. Shepard*,[163] the Seventh Circuit considered the right to the appointment of two attorneys in capital cases as provided in section 3005 of title 18 of the United States Code.[164] Shepard, a prisoner in a federal penitentiary, was indicted for the murder of a fellow prisoner, pursuant to section 1111 of title 18 of the United States Code,[165] which provided for the death penalty under circumstances parallel to those provisions held unconsitutional in *Furman v. Georgia*.[166] The *Shepard* court, disagreeing with the Fourth Circuit,[167]

156. *Id.* at 110-14.
157. *Id.*
158. 575 F.2d at 116.
159. *Id.* at 112-13.
160. 525 F.2d 671 (7th Cir. 1975), *cert. denied*, 423 U.S. 1049 (1976).
161. *Id.* at 677.
162. 575 F.2d at 114.
163. 576 F.2d 719 (7th Cir. 1978).
164. 18 U.S.C. § 3005 (1976) provides, in pertinent part:

> Whoever is indicted for treason or other capital crime shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately, upon his request assign to him such counsel, not exceeding two, as he may desire, who shall have free access to him at all reasonable hours.

165. 18 U.S.C. § 1111 (1976).
166. 408 U.S. 238 (1972).
167. United States v. Watson, 496 F.2d 1125 (4th Cir. 1973). The *Watson* court reasoned that it was impossible to determine that "the possibility of imposition of the death penalty was the *sole* reason why Congress gave an accused the right to two attorneys." *Id.* at 1128-29. Therefore, they

held that since *Furman* had precluded the possibility of a death penalty in *Shepard*, section 3005, which related to capital crimes, was inapplicable and thus the defendant had no right to the appointment of two attorneys.[168]

GRAND JURY

The United States Supreme Court has declared that the responsibilities of the grand jury "include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions."[169] The grand jury's proceedings are secret and its investigative powers are broad.[170] The Supreme Court has stated that "[i]ndispensable to the exercise of [the grand jury's] power is the authority to compel the attendance and the testimony of witnesses . . . and to require production of evidence."[171] The Court of Appeals for the Seventh Circuit recently decided three significant cases involving control of the grand jury process: *In Re Lopez*,[172] *In Re Pavone*,[173] and *Wisconsin v. Schaffer*.[174] Two of those decisions were directly related to *Gelbard v. United States*,[175] in which the Supreme Court held that a grand jury witness could refuse to answer questions after being ordered to do so by a court if the testimony sought was derived from illegal interceptions.[176]

In *In Re Lopez*,[177] three federal grand jury witnesses were held in civil contempt for refusing to take the grand jury oath and submit handwriting exemplars, fingerprints or photos. The grand jury, which had subpoenaed the three, was investigating terrorist bombings in the Northern District of Illinois, responsibility for which was claimed by a group calling itself the Fuerzas Armadas Liberacion Nacional Puertorriquena (FALN). Among other challenges, the appellants argued that

concluded it was not possible to hold that *Furman* effected a judicial repeal of § 3005, and held that "notwithstanding *Furman*, defendant had an absolute statutory right to two attorneys under § 3005." *Id.*

168. 576 F.2d at 729.

169. United States v. Calandra, 414 U.S. 338, 343 (1974). *See also* United States v. Mandujano, 425 U.S. 564 (1976); *see generally* 1977 Circuits Note, *supra* note 4, at 363-76.

170. United States v. Mandujano, 425 U.S. 564, 571 (1976).

171. *Id.*

172. 565 F.2d 407 (7th Cir. 1977).

173. 570 F.2d 674 (7th Cir. 1978).

174. 565 F.2d 961 (7th Cir. 1977).

175. 408 U.S. 41 (1972).

176. The Supreme Court did not decide if a grand jury witness could refuse to answer questions based on interceptions made pursuant to a court order. Neither did the Court consider whether a grand jury witness could be entitled to a full blown suppression hearing testing the legality of a court order authorizing an interception.

177. 565 F.2d 407 (7th Cir. 1977).

the grand jury under-represented Latinos and that the subpoenas were issued because of information obtained by unlawful wiretaps.[178] The Seventh Circuit followed the appellants' assumption that the *Gelbard* logic extended to refusal to take grand jury oaths and to submit to identification procedures, *i.e.*, if the investigation were based on illegal wiretaps, the witnesses could refuse to take the grand jury oath or to submit fingerprints.[179] The district court had accepted affidavits from the government attorneys and agents stating that they had no personal knowledge of any electronic surveillance.[180] Clearly, the agents and prosecutors assigned to the case could not speak for the entire government. Appellants argued that the district court should have ordered the government to make a search of such proportions that affidavits could be filed which unequivocally stated that no wiretapping had occurred.[181] The Seventh Circuit upheld the district court finding that the appellants fell far short of the requisite showing of specific facts demonstrating illegal electronic surveillance and, therefore, no basis existed for a more wide-ranging search.[182]

In *In Re Pavone*,[183] the Seventh Circuit considered the scope of a grant of immunity to an immunized witness. Pavone was subpoenaed before a grand jury, but refused to answer questions, claiming a fifth amendment privilege. Pavone was granted use immunity, but persisted in his refusal to answer questions, and was held in contempt.[184] On appeal, Pavone argued that the questions he was asked before the grand jury were based on illegal electronic surveillance and, therefore, his refusal to answer was justified.[185] Pavone argued that the district court had improperly denied his request for full disclosure of materials possessed by the government relating to authorization and execution of electronic surveillance.

Pavone also challenged the manner in which the contempt hearing was conducted by the district court. In that proceeding, the same judge

178. *Id.* at 409.
179. *Id.* at 413.
180. *Id.*
181. *Id.*
182. *Id.* at 416. In holding that the government's denial of unlawful surveillance was adequate, the *Lopez* court followed a line of recent federal appellate decisions which have held that the requirements for the government's denial of electronic surveillance depend upon the specificity of the allegation of illegality. *See* United States v. Vanagita, 552 F.2d 940 (2d Cir. 1977); *In re* Millow, 529 F.2d 770 (2d Cir. 1976); *In re* Mintzer, 511 F.2d 471 (1st Cir. 1975); United States v. Stevens, 510 F.2d 110 (5th Cir. 1975); *In re* Vigil, 524 F.2d 209 (10th Cir. 1975), *cert. denied*, 425 U.S. 927 (1976); United States v. See, 505 F.2d 845 (9th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975).
183. 570 F.2d 674 (7th Cir. 1978).
184. *Id.* at 676.
185. *Id.*

who had authorized Title III electronic surveillance, also conducted an *in camera* review of the petitions and authorization and found them to be sufficient in fact and law. In addition, the district court found that the grand jury questions originated from properly conducted authorized wiretaps.[186]

The *Pavone* court's decision turned on its interpretation of *Gelbard v. United States*.[187] The *Pavone* court did not read the *Gelbard* decision as mandating full discovery and evidentiary hearing whenever a grand jury witness seeks protection under section 2515 of title 18 of the United States Code.[188] Rather, the Seventh Circuit held that a proper balancing of the functioning of the grand jury system and the federal wiretap statute require no more than the *in camera* inspection performed by the district court.[189] In so ruling, the *Pavone* court appeared to follow Justice White's concurring opinion in *Gelbard*.[190]

The *Pavone* court also relied upon the Supreme Court's position in *United States v. Calandra*,[191] which held that a grand jury witness may not refuse to answer questions on the ground that the questions resulted from evidence obtained from a seizure which violated the fourth amendment.[192] The Seventh Circuit agreed with the Supreme Court that suppression hearings would unduly prolong grand jury proceedings.[193]

In *Wisconsin v. Schaffer*,[194] the appellant Kathleen Schaffer was charged with murder by the State of Wisconsin. Schaffer caused the Wisconsin trial court to issue a *subpoena duces tecum* to the United States Attorney, requiring him to produce federal grand jury minutes relating to the homicide for which Schaffer was charged. Schaffer sought the grand jury minutes because the victim and chief state witness had been involved in narcotics trafficking.

The United States Attorney sought to quash the subpoena before the state court. The court denied the motion and ordered the United States Attorney to produce the grand jury minutes or show cause why he should not be held in contempt.[195] The United States Attorney promptly filed a removal petition in the federal district court. Al-

186. *Id.*
187. 408 U.S. 41 (1972).
188. 570 F.2d at 678.
189. *Id.* at 678-79.
190. *See* 408 U.S. at 70 (White, J., concurring).
191. 414 U.S. 338 (1974). *Calandra* was not a wire interception case.
192. *Id.* at 353-55.
193. *Id.* at 349-50.
194. 565 F.2d 961 (7th Cir. 1977).
195. *Id.* at 962.

though the underlying Wisconsin murder case was, of course, criminal, the petition for removal characterized the action as civil, commenced against an officer of the United States for an act under color of his office.[196]

During the course of the removal hearing, Schaffer filed a petition pursuant to Rule (6)(e) of the Federal Rules of Criminal Procedure seeking a district court order to release the testimony before the grand jury involving the homicide.[197] The district court found that it had jurisdiction under section 1442 of title 28 of the United States Code to consider the removed contempt matter, and vacated the state court order for production of grand jury minutes and the rule to show cause.[198] The district court also denied Schaffer's Rule (6)(e) petition because it failed to state a particularized need sufficient to "overbalance the strong policy in favor of the secrecy of grand jury proceedings."[199] Schaffer appealed both orders.

The Seventh Circuit found that the district court did have jurisdiction to consider the contempt issue. Schaffer had argued that the order to show cause against the United States Attorney did not constitute a "civil action," or "criminal prosecution" within the meaning of section 1442(a) of title 18 of the United States Code.[200] The court interpreted the statute broadly, finding that the United States Attorney was placed in jeopardy for his refusal to comply with a state order based on his official duty.[201] The Seventh Circuit agreed with the Fourth Circuit, which stated in *North Carolina v. Carr*,[202] "We think it unfruitful to quibble over the label affixed to this contempt action. Regardless of whether it is called civil, criminal or sui generis, it clearly falls within the language and intent of the statute."[203] The Seventh Circuit concluded that the contempt proceeding against the United States Attorney was a sufficient separate charge and was validly removed without also removing the murder case.[204]

The *Schaffer* court, however, reversed the district court denial of Schaffer's Rule (6)(e) petition for disclosure.[205] The *Schaffer* court ex-

196. *Id.* 28 U.S.C. § 1442 (1976) provides that a civil action commenced in state court against any officer of the United States for an act committed under color of his office can be removed to United States district courts.
197. 565 F.2d at 962.
198. *Id.*
199. *Id.*
200. *Id.* at 963.
201. *Id.* at 963-64.
202. 386 F.2d 129 (4th Cir. 1967).
203. *Id.* at 131.
204. 565 F.2d at 964 (citing United States v. Penny, 320 F. Supp. 1396, 1397 (D.D.C. 1970)).
205. *Id.* at 965-67.

panded the disclosure criterion of particularized need. The court found that the district court had abused its discretion by not authorizing disclosure to the state trial judge, because (1) the federal grand jury had completed its work and thus the reasons for secrecy became less compelling; (2) the federal grand jury had investigated drug related incidents relating directly to the credibility of the state's chief witness, who had admitted killing the victim; (3) Schaffer was charged as an accessory; (4) disclosure would only be made to the state trial judge until evidence helpful to the defendant was found; and (5) the district court failed to give due weight to considerations of federalism and comity.[206] The requirements for showing a particularized need for Rule (6)(e) disclosure, thus, were clarified by the *Schaffer* court.

INDICTMENT

In the past year, the Court of Appeals for the Seventh Circuit considered challenges to indictments in *United States v. Pavloski*[207] and *United States v. Roya*.[208] In *United States v. Roya*, a physician was convicted of dispensing Schedule II controlled substances in violation of section 841(a)(1) of title 21 of the United States Code.[209] Dr. Roya dispensed prescriptions to large numbers of individuals without performing any examinations of the individuals.[210] The indictment charged that Dr. Roya attempted to dispense controlled substances "pursuant to prescriptions not written in the course of professional practice."[211] Dr. Roya argued that the indictment was vague since the language "pursuant to a prescription not written in the course of professional practice" was taken not from the criminal statute, but rather from regulations for the professional practice of physicians.[212]

The *Roya* court noted that the subject language tracked the language of regulation.[213] The court went on to note that in *United States v. Green*[214] the inclusion of that language did not improperly broaden section 841 of title 21 of the United States Code in its applicability to a

206. *Id.* at 967.
207. 574 F.2d 933 (7th Cir. 1978).
208. 574 F.2d 386 (7th Cir. 1978).
209. *Id.* at 388-89. 21 U.S.C. § 841(a)(1) (1976) provides:

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense or possess with intent to manufacture, distribute, or dispense, a controlled substance.

210. 574 F.2d at 389.
211. *Id.* at 390.
212. *Id.* Dr. Roya was referring to 21 C.F.R. § 1306.04(a).
213. 574 F.2d at 390.
214. 511 F.2d 1062 (7th Cir.), *cert. denied*, 423 U.S. 1031 (1975).

medical practitioner.[215] In *Green*, the appellant had challenged the inclusion of reference to the regulation in the indictment. In *Roya*, the appellant attacked the failure of the government to include a reference in the indictment to the specific regulation. The *Roya* court rejected the appellant's argument, holding that the disputed language was not essential to a properly drawn indictment since the indictment need not negate an exception to the statute.[216]

Dr. Roya also challenged the indictment because it did not state in each count the names of the individuals to whom he had allegedly dispensed controlled substances. The Seventh Circuit held that the "test is whether the indictment sets forth the elements of the offense charged and sufficiently apprises the defendant of the charges to enable him to prepare for trial."[217] Since each count set forth the time and place of the defendant's conduct, the *Roya* court held that the test had been satisfied.[218]

In *United States v. Pavloski*,[219] the defendant was charged with embezzling and converting union funds and making false statements in a labor organization. Pavloski was the treasurer of a local union. Between 1972 and 1975, he cashed twenty-three checks drawn on the union account and kept the proceeds. Pavloski forged the name of the union president, and indorsed each check with his own name. The bank did not detect the forgery and honored all checks. Under long settled commercial law principles and the Uniform Commercial Code,[220] a drawee bank pays out of its own funds if it honors a forged check. Applying this doctrine, Pavloski argued that he embezzled not the union's funds, but the bank's funds.[221]

The Seventh Circuit held that since Pavloski had converted the blank checks of the union, that alone was enough to satisfy the statute.[222] Moreover, because the bank did honor the checks, Pavloski did convert union funds, even if such conversion was only temporary.[223] Finally, the court noted it was unlikely that the union would be able to recover its funds from the bank under commercial law principles be-

215. 574 F.2d at 390.
216. *Id.* at 391. The Seventh Circuit also noted that in United States v. Moore, 423 U.S. 122, 124 (1975), the Supreme Court held that registered physicians can be prosecuted under 21 U.S.C. § 841 if their activities fall outside the usual course of professional conduct.
217. 574 F.2d at 391.
218. *Id.*
219. 574 F.2d 933 (7th Cir. 1978).
220. U.C.C. § 3-418.
221. 574 F.2d at 935.
222. *Id.* at 935-36.
223. *Id.*

cause of its delay in discovering the forgeries and reporting them to the bank.[224]

The Seventh Circuit's resolution of Pavloski's attack on the sufficiency of his indictment is in keeping with rule 7(c)(1) of the Federal Rules of Criminal Procedure, which requires that indictments be plain, concise and definite written statements of the essential elements constituting the offense charged. This rule implements the constitutional requirement of the sixth amendment that defendants have the right to be informed of the nature and cause of accusation. In applying the notice requirement, the *Pavloski* court applied a common sense reading of the indictment.

In the same count, Pavloski also was charged with converting and embezzling cash dues and union initiation fees. He argued that the count was duplicitous, *i.e.*, that it charged two or more distinct and separate offenses.[225] The Seventh Circuit discussed the purposes served by the rule against duplicity, which include the prevention of (1) double jeopardy, (2) prejudice with respect to evidentiary rulings during trial, and (3) conviction by a verdict that is not unanimous.[226] The *Pavloski* court held that only the last test was of any significance in the case before it.[227]

Since Pavloski offered no instruction stating that the jurors must agree on at least one act, the Seventh Circuit was not inclined to hold that the general instruction on unanimity was insufficient. The court also noted that Pavloski admitted committing all the acts alleged, and merely denied that he possessed the requisite mental state. The court, therefore, found no possibility of prejudice through lack of unanimity.[228]

SEVERANCE

Rule 8(a) of the Federal Rules of Criminal Procedure permits the joinder of two or more offenses in an indictment or information if the offenses are of the same or similar character or arise out of "a common scheme or plan."[229] Multiple defendants may be charged in the same indictment "if they are alleged to have participated in the same act or

224. *Id.* at 936.
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. FED. R. CRIM. P. 8(a) provides:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or

transaction or in the same series of acts or transactions constituting an offense."[230] Rule 14 of the Federal Rules of Criminal Procedure provides for the severance of co-defendants when such relief is necessary to protect the parties.[231]

The Court of Appeals for the Seventh Circuit, in accordance with the majority of circuits, disfavors severance for co-defendants named in a single indictment.[232] In *United States v. Grabiec*,[233] *United States v. Alpern*[234] and *United States v. Holleman*,[235] the Seventh Circuit considered the standard for severance.

Grabiec involved a prosecution for extortion of money under color of official rights of a former director of the Illinois Department of Labor and a former superintendent of the Division of Private Employment Agencies. On appeal, one defendant argued that he should have been severed because the evidence of his co-defendant's guilt was "overwhelming."[236] The *Grabiec* court reiterated the well-settled principle that the broad discretion of a trial judge in ruling on severance motions will not be upset unless an abuse of discretion has been shown.[237] A mere disparity in the evidence is insufficient.[238]

In *Holleman*, one co-defendant argued that the admission of a co-defendant's statement, which allegedly inculpated the appellant in violation of the rule in *Bruton v. United States*,[239] so prejudiced him that

on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

See generally 1977 Circuits Note, *supra* note 4, at 392-96.

230. FED. R. CRIM. P. 8(b) provides:

Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

231. FED. R. CRIM. P. 14 provides:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce at the trial.

232. In United States v. Barrett, 505 F.2d 1091, 1106 (7th Cir. 1974), *cert. denied*, 421 U.S. 964 (1975), the Seventh Circuit stated, "Reversal of a conviction . . . for failure to sever an offense under Rule 14 is almost non-existent." *See* Haddad, *supra* note 16, at 307; 1977 Circuits Note, *supra* note 4, at 392-96.

233. 563 F.2d 313 (7th Cir. 1977).

234. 564 F.2d 755 (7th Cir. 1977).

235. 575 F.2d 139 (7th Cir. 1978).

236. 563 F.2d at 318.

237. *Id.*

238. *Id.* at 318-19.

239. 391 U.S. 123, 127-28 (1968). In *Bruton*, the Supreme Court held that admission of a co-defendant's out-of-court statement inculpating the defendant violates the defendant's sixth

the trial court abused its discretion by denying a severance. The Seventh Circuit majority disagreed with the appellant, and held that *Bruton* had not been violated, that severance need be granted only for the most compelling reasons, and that appellant must demonstrate that a fair trial cannot be had without a severance.[240] The court held that it was insufficient to show that a separate trial offers a better chance for acquittal.[241]

In *United States v. Alpern*,[242] the court examined the severance issue in far greater detail. *Alpern* involved a trial of five defendants for conspiracy to bomb a tavern. The defendants were engaged in interstate commerce and various substantive offenses committed in the course of the conspiracy. One defendant, Mierlak, alleged that the trial court abused its discretion by denying his motion for severance.[243] In support of his position, Mierlak argued that (1) he was named in only two of thirteen counts; (2) he was the only one of five co-defendants who did not have a prior criminal record; (3) he was a former policeman, and thus may have been found guilty simply because of his association with the four other co-defendants; (4) he was allegedly prejudiced by testimony that a co-defendant attempted to orchestrate a witness' testimony at trial; and (5) he was allegedly prejudiced by testimony that the government's principal witness feared for his life, presumably because of threat from co-defendants.[244] The *Alpern* court rejected Mierlak's contentions.

Citing *United States v. Papia*,[245] the court held that Mierlak was entitled to "separate trial only if it was not within the jury's capacity to follow the court's limiting instructions to assess each defendant's guilt or innocence solely on the basis of the evidence admissible against him."[246] Because the necessity for separate trials depends on the peculiarities of particular cases, the district judges are accorded wide discretion in ruling on motions for severance. The *Alpern* court held that such rulings will not be overturned unless there is a clear showing of abuse.[247] The Seventh Circuit found no abuse of discretion, pointing primarily to the fact that one of Mierlak's co-defendants was acquitted

amendment confrontation rights if the co-defendant who made the statement does not take the stand. *See* 1977 Circuits Note, *supra* note 4, at 594.

240. 575 F.2d at 142.
241. *Id.*
242. 564 F.2d 755 (7th Cir. 1977).
243. *Id.* at 757.
244. *Id.* at 758.
245. 560 F.2d 827 (7th Cir. 1977).
246. 564 F.2d at 758.
247. *Id.*

by the same jury. Thus, the Seventh Circuit refused "to assume that the jury was so inflamed with passion and prejudice as to be unable to separate the guilty from the innocent."[248]

DISCOVERY AND DISCLOSURE

The Court of Appeals for the Seventh Circuit issued a number of opinions this past term dealing with criminal discovery[249] and prosecutorial disclosure mandated by *Brady v. Maryland*.[250]

The Seventh Circuit considered the issue of newly discovered evidence in *United States v. Hedgeman*.[251] As in many newly discovered evidence cases, an examination of the facts in *Hedgeman* is essential. Hedgeman was an Area Management Broker for the Federal Housing Authority. He was convicted of filing false claims and filing false statements. Hedgeman also was indicted but not convicted of conspiracy.[252]

One of the government's principal witnesses, Pearson, a contractor, testified he had paid kickbacks to Hedgeman. Through Pearson, the government introduced Pearson's work sheets bearing notations of amounts paid to Hedgeman. Pearson was rigorously cross-examined concerning the work sheets and the fact that Pearson had engaged in such illegal acts as destroying records to impede an Internal Revenue Service investigation and using fictitious names on bids. Pearson also was cross-examined concerning his agreement to testify for the government, which protected him from prosecution.

The court interpreted the cross-examination to raise the inference that Pearson had recently fabricated the notations. Pearson also testified that he had not requested that any examination be performed on the document to determine its age.

Both the defense and the government contacted the same expert, who told both parties that no tests could determine the age of ink. About two and one half years after the trial, Hedgeman's defense counsel learned that the expert had examined Pearson's work sheets and

248. *Id.*

249. Criminal discovery on federal cases is regulated by FED. R. CRIM. P. 16. Generally the scope of rule 16 discovery is within the discretion of the trial court. Hemphill v. United States, 392 F.2d 45 (8th Cir. 1968). *But see* United States v. Cook, 432 F.2d 1093 (7th Cir. 1970).

250. 373 U.S. 83 (1963).

251. 564 F.2d 763 (7th Cir. 1977), *cert. denied*, 434 U.S. 1070 (1978).

252. Hedgeman's duties required him to solicit bids, make contracts and process claims for services in connection with the rehabilitation of properties which had been acquired by forfeiture. The testimony at trial clearly established that Hedgeman signed and passed on forms for work which had not been performed; that he passed on bids in the names of persons who were not bona fide contractors; and that he filled out and passed on bids that otherwise were not bona fide bids. *Id.* at 764.

concluded that someone had performed tests for ink. The defense moved for a new trial, arguing that this constituted newly discovered evidence.[253]

The district court, in ruling on Hedgeman's post trial motion, had assumed that the evidence would have impeached Pearson and was deliberately withheld.[254] Nevertheless, the court denied Hedgeman's motion for a new trial. Citing *United States v. Agurs*,[255] the court held that Hedgeman's conviction must be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."[256] The trial court found that Pearson's testimony related to conspiracy charges, of which Hedgeman was acquitted, and thus, the evidence could not have affected the jury's verdict.[257]

The Seventh Circuit concluded that Hedgeman's central claim was that Pearson had lied by stating that no tests were conducted pursuant to his request, in order to determine the age of the ink. The subsequent testimony of the expert did not establish whether such a test was made to determine the age of the ink. In fact, no such determination could be made.[258]

The court of appeals held that Hedgeman's motion had been properly denied, although it expressed doubt about the propriety of the district court's assumptions. The court of appeals concluded that the defense had not exercised due diligence in seeking the subject evidence.[259]

The *Hedgeman* court also appeared to reaffirm the traditional test for a new trial based on newly discovered evidence.[260] The court further noted that when new evidence challenges the constitutional validity of a conviction, the traditional test diminishes in importance.[261] The Seventh Circuit noted with approval that two other circuits had

253. *Id.* at 765.
254. *Id.* at 766.
255. 427 U.S. 97 (1976).
256. *Id.* at 103.
257. 564 F.2d at 766.
258. *Id.* at 767.
259. *Id.* at 768-69.
260. *Id.* at 768. The Seventh Circuit cited United States v. Curran, 465 F.2d 260, 264 (7th Cir. 1972), for the standard:

> 1st. That the evidence has come to his knowledge since the trial. 2d. That it was not owing to want of due diligence that it did not come sooner. 3d. That it is so material that it would probably produce a different verdict, if the new trial were granted. 4th. That it is not cumulative only—viz.: speaking to facts, in relation to which there was evidence on the trial. 5th. That the affidavit of the witness himself should be produced, or its absence accounted for. And 6th, a new trial will not be granted, if the only object of the testimony is to impeach the character or credit of a witness.

564 F.2d at 768 n.2.
261. *Id.* at 768 (citing United States v. Agurs, 427 U.S. 97, 111 (1976)).

applied a due diligence test, even in cases which raised constitutional issues.[262] The court concluded by stating that it found little reason to say Hedgeman's trial was unfair.

The Court of Appeals for the Seventh Circuit dealt with the issue of alleged violations of the government's duty to disclose evidence favorable to the defendant in *United States v. Mackey*[263] and *United States v. Weidman*.[264] Under *Brady v. Maryland*, the well-known United States Supreme Court case regarding the duty to disclose, suppression by the prosecution of evidence favorable to the defendant violates due process where the evidence is material either to guilt or punishment.[265] In *United States v. Agurs*,[266] the Supreme Court established standards for resolving the issue of whether a fact is material. *Agurs* held that where a defendant has made a request for specifically designated evidence, the test for materiality is whether the undisclosed evidence might have affected the outcome of the trial.[267] On the other hand, where the defendant has made only a general request for favorable evidence or has made no *Brady* request, the test for materiality is whether the undisclosed evidence creates a reasonable doubt that did not otherwise exist.[268]

United States v. Mackey,[269] involved a prosecution for attempted tax evasion and conspiracy to evade payment of taxes. The evidence at trial established that Mackey had provided money to other individuals to invest on his behalf in order to hide Mackey's interest from the Internal Revenue Service.[270] One witness, Carl Smith, testified that he had received $25,000 from the defendant, and at the defendant's request had purchased an interest in a real estate firm. Long before that transaction, the IRS had interviewed Smith about his possible trafficking in narcotics. The memoranda of those interviews were not disclosed.

Before trial, the defense counsel had requested "information relating to material inconsistencies between statements"[271] given by any individuals whether or not they were prospective government witnesses. The defense argued that the IRS interview notes would have explained

262. The *Hedgeman* court explicitly declined to follow the District of Columbia Circuit's position in Marshall v. United States, 436 F.2d 155 (D.C. Cir. 1970) that the due diligence standard was inapplicable in the constitutional issue context. 564 F.2d at 768.
263. 571 F.2d 376 (7th Cir. 1978).
264. 572 F.2d 1199 (7th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3221 (U.S. Oct. 3, 1978).
265. 373 U.S. at 87.
266. 427 U.S. 97 (1976).
267. *Id.* at 104.
268. *Id.* at 112.
269. 571 F.2d 376 (7th Cir. 1978).
270. *Id.* at 380-81 [hereinafter referred to in the text as the IRS].
271. *Id.* at 388.

the source, *i.e.*, narcotics trafficking of the $25,000 Smith testified he had received from Mackey. Thus, the failure to provide the interview notes was alleged to be a violation of *Brady*.[272]

The Seventh Circuit determined that the defense's request for material was a "general" request as defined in *Agurs*. The court also held that the government had not violated its duty to disclose favorable evidence.[273] The court considered the Supreme Court's admonition in *Agurs*: "The prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial."[274] The Seventh Circuit held that the determination of whether non-disclosure had deprived a defendant of a fair trial should be made by the district judge. That determination will not be overturned under the test set out in *Agurs* if the trial court's "first hand appraisal of the record" was "thorough" and "reasonable."[275] The *Mackey* court found that the district court did not err in ruling that fair trial had not been denied, because Smith had in fact been cross-examined thoroughly and the issue of his possible narcotics trafficking had been raised.

The defense also argued that the failure to disclose the IRS interview was a violation of the Jencks Act.[276] The Seventh Circuit found no basis for reversing the district court's conclusion that the statement did not "relate" to Smith's testimony within the meaning of the Act, and even assuming that it had, failure to produce the statement was harmless error.[277]

United States v. Weidman[278] also involved the issue of non-disclosure. The defendant was convicted of mail fraud involving a construction company of which he was president. The indictment charged that Weidman and his co-defendants had obtained money, goods and services through fictitious and inflated work orders, invoices and purchase orders during a major steel mill construction project.[279]

On appeal, Weidman argued that he was prejudiced by the district court, which had denied his motion for a new trial. He alleged that the

272. *Id.*
273. *Id.* at 388-89.
274. *Id.* at 388 (citing 427 U.S. at 108).
275. *Id.* at 389 (citing 427 U.S. at 114).
276. 18 U.S.C. § 3500 (1976). This section governs the production of statements made to government agents by government witnesses in criminal cases. Reports and similar materials given by a government witness are available after the witness has testified against the defendant on direct examination in open court. Such statements will be available if they relate to the subject matter on which the witness has testified.
277. 571 F.2d at 389.
278. 572 F.2d 1199 (7th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3221 (U.S. Oct. 3, 1978).
279. *Id.* at 1201.

government had failed to disclose information relating to a key government witness, Cox. Specifically, that information concerned (1) the government's and Cox's alleged discussions in 1972 about a grant of full immunity; (2) the government's alleged agreement to recommend that no fine be imposed on Cox for filing a false income tax return; and (3) Cox's alleged attempt to bribe an NLRB figure.[280]

Using the *Agurs* "materiality" standard for testing non-disclosure, the Seventh Circuit held that all of the alleged "non-disclosures" were not sufficiently material to establish any constitutional error.[281] Cox had been granted immunity in 1974 and had testified at trial pursuant to that grant. The 1974 grant of immunity was disclosed to the defense and Cox was thoroughly impeached. The Seventh Circuit held that the lower court's finding that the government did not make a "no fine" recommendation for witness Cox was not "wholly unsupported by the evidence."[282] The court also found that failure to disclose any discussion with Cox on this issue was insufficiently material to warrant a new trial.

On the final point, Cox's alleged attempt to bribe an NLRB official, the Seventh Circuit held that no violation of *Brady* had occurred because the prosecution did not possess any documents relating to the alleged attempt and was not even aware of the attempt until the defense requested documents relating to the matter.[283] Cox was, in fact, cross-examined by the defense on this issue.

The Seventh Circuit also held that the "statement" made by an NLRB official which purported to set forth an account of an interview with Cox, but which Cox refused to sign or read, was not producible at trial under the Jencks Act.[284] The court also noted that, even assuming the NLRB "statement" was producible, the government's failure to do so did not prejudice Weidman so as to warrant a new trial.[285]

The court also addressed a Jencks Act issue in *United States v. Consolidated Packaging Corp.*,[286] in which a corporation was found guilty of participating in a price fixing conspiracy in violation of the Sherman Act. The corporation alleged that it was prejudiced by the trial court's refusal to require disclosure of government counsel's mem-

280. *Id.* at 1203.
281. *Id.* at 1208.
282. *Id.* at 1205.
283. *Id.* at 1206. The *Weidman* court relied on (1) the defense knowledge of the matter; (2) the availability of the NLRB file to the defense by subpoena; and, (3) the lack of knowledge of the matter by the prosecution.
284. *Id.* at 1207.
285. *Id.*
286. 575 F.2d 117 (7th Cir. 1978).

oranda of interviews with government witnesses. All of the memoranda in question were prepared after interviews with witnesses.

The Seventh Circuit reaffirmed the principle of *Palermo v. United States*,[287] which stated that the Jencks Act does not require production of a statement subsequently prepared, no matter how accurate it may be.[288] The court also noted that the defense was apprised of the substance of the interview in a bill of particulars. Consolidated Packaging argued that it was prejudiced because a key government witness invoked the fifth amendment privilege against self-incrimination, and failed to produce his personal income tax returns. The Seventh Circuit agreed with the trial court's finding that the records were irrelevant to the issues on trial. The Court of Appeals also held that the grant of immunity to a government witness does not broaden the issues or "so expand relevancy as to permit trial of a witness by defense counsel for some possible tax violation."[289]

OTHER PRETRIAL DISCOVERY

The Court of Appeals for the Seventh Circuit also had occasion to consider, but not resolve, the issue of discovery to a grand jury witness of a transcript of his own testimony. In *United States v. Clavey*,[290] the former sheriff of Lake County, Illinois was charged in an eight-count indictment specifying four counts of false swearing before a grand jury, three counts of failure to report income on his tax returns, and one count of conspiracy to extort funds from a liquor license holder. Clavey was acquitted of three of the perjury counts, and the extortion count.[291]

On appeal, Clavey argued, *inter alia*, that he was denied effective assistance of counsel because he was denied a transcript of his grand jury testimony.[292] Clavey argued that he was thus unable to assert his right to recant his testimony under section 1623(d) of title 18 of the United States Code[293] before indictment. Clavey had appeared before the grand jury and testified without representation by counsel. After

287. 360 U.S. 343, 352-53 (1959).
288. 575 F.2d at 129.
289. *Id.* at 131.
290. 565 F.2d 111 (7th Cir. 1977), *reh. en banc* No. 76-1926 (7th Cir. June 23, 1978).
291. *Id.* at 113.
292. *Id.*
293. 18 U.S.C. § 1623(d) (1976):

> Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

his appearance, Clavey retained counsel who filed petitions for release of a transcript. Clavey's unverified petitions alleged that he did not recall his testimony because of illness.[294] The petition was denied.

The majority of the original Seventh Circuit panel held that in light of Clavey's failure to submit a verified petition, the district court did not err in denying Clavey's petition for disclosure.[295] Judge Swygert filed a vigorous dissent, arguing that a grand jury witness has a prima facie right to a copy of his own testimony and that, therefore, the "particularized need" standard should not be applied.[296] Judge Swygert argued further that, even under the "particularized need" standard, Clavey should have been granted a copy of his own testimony.[297]

The Seventh Circuit granted rehearing *en banc* on the issue of grand jury transcript disclosure to witnesses.[298] After reargument, the court of appeals was equally divided on the issue, so the district court's decision was left standing without order.[299] Because the *en banc Clavey* court was equally divided, the issue remains unresolved in this circuit.

Judge Swygert voted to reverse the decision and filed a separate opinion answering the argument that non-disclosure of Clavey's testimony was harmless because the defense of recantation was not available to him.[300] Judge Swygert strongly criticized the government for raising the argument "at the last minute."[301] Judge Swygert concluded that the language of section 1623(d) of title 18 of the United States Code "has not become manifest"[302] and refers to the witness who desires to recant.

JURY INSTRUCTIONS AND DELIBERATIONS

This past term the Court of Appeals for the Seventh Circuit issued a number of decisions relating to control of jury deliberations, the most significant of which was *United States v. Arciniega*.[303] In *Arciniega*, the defendants were tried for violations of federal narcotics laws. After the jury had deliberated for less than an hour, the trial judge permitted the

294. 565 F.2d at 113-14.
295. *Id.* at 115.
296. *Id.* at 120 (Swygert, J., dissenting).
297. *Id.* at 122-24.
298. All other holdings of the original *Clavey* panel were not affected by the rehearing *en banc*. No. 76-1926, Slip. Op. at 2.
299. *Id.* at 1.
300. *Id.* at 2.
301. *Id.* at 3.
302. *Id.*
303. 574 F.2d 931 (7th Cir. 1978).

jury to separate and return home. The jury returned the following morning, resumed its deliberations and returned a verdict of guilty.

On appeal, Arciniega contended that the district court committed reversible error by permitting the jury to separate.[304] The Seventh Circuit disagreed and held that the decision to permit a jury to separate rests within the sound discretion of the trial judge.[305] In addition, the court held that for such a separation to constitute reversible error, there must be a specific objection by the defense, supported by specific reasons and a showing that the defense was prejudiced by the separation.[306]

The *Arciniega* court overruled two previous Seventh Circuit decisions, *United States v. D'Antonio*[307] and *United States v. Panczko*,[308] which had held that it was reversible error to permit a jury to separate over defense objection even though no actual prejudice to the defendant was shown.[309] The Seventh Circuit noted that every other circuit court of appeals already had taken a position similar to that expressed in *Arciniega*,[310] a position which had been expressed earlier in the Seventh Circuit by Judge Swygert in his dissent in *D'Antonio*.[311]

The Seventh Circuit also had occasion to discuss rule 31(d) of the Federal Rules of Criminal Procedure, which provides a defendant with the right to poll a jury following the return of its verdict. In *United States v. Shepard*,[312] four federal prisoners were prosecuted for the murder of a fellow prisoner. Prior to their deliberations, the jury was instructed that their verdict must be unanimous. The jury found three defendants guilty and acquitted the fourth prisoner. Following the return of the verdict, but prior to polling the jury, the trial court made certain comments which, the appellants later argued, prejudiced the defendants' right to poll the jury.[313] Defense counsel then polled the jury, all of whom confirmed the verdict.

On appeal, the *Shepard* court examined the purposes behind the ancient right to poll a jury. The court noted that polling has been de-

304. *Id.* at 932.
305. *Id.* at 933.
306. *Id.*
307. 342 F.2d 667 (7th Cir. 1965).
308. 353 F.2d 676 (7th Cir. 1965), *cert. denied*, 383 U.S. 935 (1966).
309. 574 F.2d at 932.
310. *See, e.g.*, United States v. Menna, 451 F.2d 982 (9th Cir. 1971), *cert. denied*, 405 U.S. 963 (1972); Sullivan v. United States, 414 F.2d 714 (9th Cir. 1969); United States v. Breland, 376 F.2d 721 (2d Cir. 1967); Cardarella v. United States, 375 F.2d 222 (8th Cir.), *cert. denied*, 389 U.S. 882 (1967); Hines v. United States, 365 F.2d 649 (10th Cir. 1966).
311. 342 F.2d at 671-72 (Swygert, J., dissenting).
312. 576 F.2d 719 (7th Cir. 1978).
313. *Id.* at 722-23.

scribed as a substantial right, but is not of constitutional dimension.[314] The court concluded that the purpose behind polling a jury is not to invite the individual jurors to change their minds, but to determine if the verdict was "in truth" unanimous. The Seventh Circuit held that it was highly unlikely that the court's comments could have prevented a unanimous verdict. The court noted that the jury had been clearly instructed in the necessity of unanimity. In addition, the *Shepard* court pointed out that in light of the acquittal of one defendant and the conviction of the other three it was unlikely that the majority of jurors were so overzealous or inflamed that they coerced other jurors.[315]

In *United Stated v. Clavey*,[316] the Seventh Circuit also addressed the issue of the proper method to respond to questions from a jury during its deliberations. In *Clavey*, while deliberating in the evening before the day on which they returned their verdict, the jury sent a note to the trial judge requesting that copies of the instructions be sent to the jury. The court denied that request, and did not advise counsel of the request. Later in the same evening, the jury requested instructions from the court as to the indictment and counts. Again, the trial court denied the request and failed to advise counsel of the incident. Finally, on the following morning, the jury asked whether they were required to find Clavey guilty on count one if they found him guilty on counts two and three. The trial court replied that the jury should continue its deliberations. A short time later, the jury reached its verdict.[317]

On appeal, Clavey argued that the trial court erred in dealing with the jury question. The court of appeals concluded that the trial court had erred in failing to advise the defense counsel of the jury's questions. Furthermore, the court held that the judge should have attempted to answer the jury's questions, at least by rereading the original instructions which related to the jury's difficulty.[318]

Despite its conclusion that the trial judge had erred, the Seventh Circuit held that the error was harmless because the jury's verdict demonstrated, in the court's opinion, that the jury resolved its doubts in favor of Clavey.[319] Thus, the court reasoned, Clavey could not have been prejudiced by the judge's failure to answer the jury's questions because Clavey could not have received a more favorable result from

314. *Id.* at 724.
315. *Id.* at 725.
316. 565 F.2d 111 (7th Cir. 1977). For additional discussion of this case, *see* text accompanying notes 289-301 *supra*.
317. *Id.* at 118.
318. *Id.* at 119.
319. *Id.*

the judge's answer.[320]

PLEAS AND SENTENCING

Rule 11 of the Federal Rules of Criminal Procedure requires that the defendant be fully advised of the consequences of his plea, particularly regarding the sentence which he may receive.[321] The Seventh Circuit considered the propriety of imposing sentence after the defendant had moved to vacate his guilty plea in *United States v. Bell*.[322] That case involved a multiple bank robbery defendant who was transferred to the Northern District of Illinois after his arrest in Arizona. The trial judge appointed counsel for Bell only eleven days before trial, and denied Bell's motion for a continuance. Bell entered a plea of guilty on the day of the trial. Forty-two days prior to his sentencing date, Bell moved to vacate this plea, arguing that he had entered it under duress, because of the trial court's denial of Bell's motion for a continuance. Judge McMillen refused to delay sentencing, and did not rule on the motion to vacate the guilty plea until six months after sentencing.[323]

On appeal, the Seventh Circuit noted that it is well settled that a different standard applies to motions to vacate guilty pleas made before sentencing.[324] Rule 32(d) of the Federal Rules of Criminal Procedure provides: "A motion to withdraw a plea of guilty . . . may be made only before sentence is imposed . . . ; but to correct manifest injustice

320. *Id.* at 120.

321. FED. R. CRIM. P. 11 provides, in relevant part:

> (c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following: (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and (2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceedings against him and, if necessary, one will be appointed to represent him; and (3) that he has the right to plead not guilty or to persist in that plea if it has already been made and he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and (4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and (5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.
> (d) Insuring that the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

See generally Haddad, *supra* note 16, at 310; 1977 Circuits Note, *supra* note 4, at 437-51, 601-16.

322. 572 F.2d 579 (7th Cir. 1978).

323. *Id.* at 580.

324. *Id.* at 581.

the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

Since the motion to vacate was made well in advance of the sentencing, the *Bell* court ruled that the defendant's motion should have been considered and decided. The court held that such a motion to vacate a guilty plea should be ruled on before sentencing to avoid not only the appearance of pre-judgment, but also the danger that it will not be humanly possible to judge the motion by the correct standard.[325]

In *United States v. Hooper*,[326] the Seventh Circuit considered the authority of district judges to impose "split sentences." A split sentence, as provided in section 3651 of title 18 of the United States Code,[327] consists of a period of incarceration and a period of probation for misdemeanor convictions which carry a maximum sentence of six months imprisonment. The defendant in *Hooper* pleaded guilty to a violation of section 1701 of title 18 of the United Stated Code (delay of the mail) which carries a maximum sentence of six months. The district judge imposed a sentence of four years probation with a special condition of probation that the defendant spend ninety days in a jail-type institution. The defendant appealed, arguing that the sentence was an impermissible "split sentence" which can only apply to the more serious crimes under section 3651. The government argued that the requirement that the defendant spend ninety days in a jail-type institution was a valid condition of probation under section 3651.[328]

The *Hooper* court held that the judge's intention to impose either a "split sentence" or incarceration as a condition of probation was immaterial since neither alternative was permissible.[329] The Seventh Circuit

325. *Id.*

326. 564 F.2d 217 (7th Cir. 1977).

327. 18 U.S.C. § 3651 (1976) provides, in pertinent part:

> Upon entering a judment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.
>
> Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, if the maximum punishment provided for such offense is more than six months, any court having jurisdiction to try offenses against the United States, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.

328. 564 F.2d at 218.

329. *Id.* at 221. The trial judge had provided that Hooper was to be permitted to leave the Metropolitan Correctional Center each day to engage in drug counseling. *Id.* at 221. The court of

sympathized with the trial court's attempt to fashion a "custom-made" solution which would be of maximum benefit to both the defendant and society, but held that the statutory sentencing scheme provided by Congress did not permit the sentence imposed.[330]

United States v. Shelby[331] also involved consideration of the authority of the sentencing court under section 3651. In *Shelby*, a bank robbery defendant was sentenced to a period of incarceration and probation, with a requirement that the defendant make restitution in such amounts and at such times as directed by the probation department. The Seventh Circuit court held that the sentence, as it related to restitution, was too vague. No maximum limitation was set by the court to correspond to the actual loss resulting from the offenses of which Shelby was convicted.[332] The case was remanded for imposition of restitution falling within the limits of section 3651.[333]

APPEALS

Section 1291 of title 28 of the United Stated Code grants courts of appeals jurisdiction to review "all final decisions" of the district courts, both civil and criminal.[334] In *Abney v. United States*,[335] the United States Supreme Court stated, "[I]t is well settled that there is no constitutional right to an appeal . . . . The right of appeal, as we presently know it is purely a creature of statute; in order to exercise that statutory right of appeal one must come within the terms of the applicable statute . . . ."[336] The Supreme Court noted that "[a]dherence to this rule of finality has been particularly stringent in criminal prosecutions."[337] The standard of review of federal trial proceedings permits reversal

appeals believed that the trial judge attempted to assist the defendant's rehabilitation while also protecting society.

330. The court of appeals found that the legislative history and the statutory language limited the use of split sentences to more serious offenses—when the maximum punishment provided is more than six months. *See* 18 U.S.C. § 3651 (1976).

331. 573 F.2d 971 (7th Cir. 1978).

332. *Id.* at 976.

333. 18 U.S.C. § 3651 (1976) provides that the sentencing court can require the defendant "to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had."

334. 28 U.S.C. § 3651 (1976) provides, in pertinent part:

> The courts of appeals shall have jurisdiction from appeals from all final decisions of the district courts of the United States . . . except where direct review may be had in the Supreme Court.

See generally 1977 Circuits Note, *supra* note 4, at 631-47.

335. 431 U.S. 651 (1977).

336. *Id.* at 656-57.

337. *Id.* at 657.

only when the trial court has abused its broad discretion.[338]

In *United States v. Rothman*,[339] the Court of Appeals for the Seventh Circuit considered the standard for appellate review of the denial of a motion for a continuance. *Rothman* involved a mail fraud prosecution. The trial was begun approximately six weeks after counsel was appointed. The *Rothman* court emphasized the wellsettled rule that an order denying a motion for a continuance is not subject to review unless there is a clear showing of abuse of discretion.[340] The court also said that no mechanical tests can be applied and that the circumstances of each case must be examined.[341] The court noted that while defense counsel argued that he had inadequate time to prepare, he did not interview any of the known witnesses prior to trial. The Seventh Circuit found that District Judge Marshall had not abused his discretion by denying the defendant's motion for a continuance.[342]

PROBATION AND PAROLE

Congress has granted federal courts broad sentencing powers.[343] Title 18 grants a district court the power to suspend sentence and place defendants on probation when the court is satisfied that the "ends of justice" will be satisfied.[344] Congress also has authorized the United States Parole Commission to grant parole release to prisoners conditional on good behavior.[345]

In *Morrissey v. Brewer*,[346] the Supreme Court held that due process requires that certain articulated rights be accorded to a parolee during a parole revocation proceeding. The Seventh Circuit considered one aspect of the "minimum requirements of due process" for proba-

338. United States v. Medina, 552 F.2d 181, 192 (7th Cir.), *cert. denied*, 434 U.S. 839 (1977); United States v. Orzechowski, 547 F.2d 978, 982 (7th Cir. 1976), *cert. denied*, 431 U.S. 906 (1977).

339. 567 F.2d 744 (7th Cir. 1977).

340. *Id.* at 747 (citing United States v. Collins, 435 F.2d 698 (7th Cir. 1970), *cert. denied*, 401 U.S. 957 (1971)).

341. *Id.* at 747 (citing Unger v. Sarafite, 376 U.S. 589 (1964)).

342. *Id.* at 748-49.

343. *See* 18 U.S.C. § 3651 (1976). *See also* 1977 Circuits Note, *supra* note 4, at 684-87.

344. 18 U.S.C. § 3651 (1976).

345. *See generally* 18 U.S.C. §§ 4201-4218 (Supp. 1977).

346. 408 U.S. 471 (1972). The *Morrissey* Court held that the minimum due process requirements at a parole revocation proceeding include:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Id. at 489. *See generally* 1977 Circuits Note, *supra* note 4, at 675-84. *See also* 18 U.S.C. § 4214 (1976).

tion revocation proceedings in *United States v. Davila*.[347] The Seventh Circuit stated in its opinion: "It is clear from the Supreme Court's decision in *Gagnon v. Scarpelli*[348] that the minimum requirements of due process which govern the revocation of probation are precisely the same as those established in *Morrissey v. Brewer*."[349] The *Davila* court held that the requirement of "notice" of alleged violations of probation, enunciated in *Morrissey* and *Gagnon*, meant that *written* notice of alleged violations is required before a final hearing.[350] The court also held that receipt by the probationer of written notice at the time of the final revocation hearing is inadequate.[351]

In *United States v. Smith*,[352] the Seventh Circuit considered the issue of what standard must be used in determining whether a probationer has violated his probation. Smith had been placed on probation for firearm offenses. The first condition of Smith's probation was that he refrain from violating any law. The government brought probation revocation charges against Smith, alleging that he had participated in the armed robbery of a female letter carrier. Smith also was charged with armed robbery by the state for the same offense. The revocation hearing occurred prior to the state trial.[353] At the conclusion of the hearing, the district court revoked Smith's probation, saying that it was "reasonably satisfied" that Smith had committed armed robbery. The Seventh Circuit held that this was the appropriate standard.[354] The court held that whether Smith was later acquitted of the state armed robbery charge was immaterial. The court reasoned that a stricter standard would be against the public interest in that a "poor risk convicted felon" might be permitted to remain at large.[355]

In *Bryant v. Grinner*,[356] the Seventh Circuit clarified the standard to be applied in determining whether delays between the execution of parole violation warrants and parole revocation hearings are unreasonable. In *Bryant*, the district court held that a 125 day delay before a

347. 573 F.2d 986 (7th Cir. 1978).
348. 411 U.S. 778 (1973).
349. 573 F.2d at 987.
350. *Id.* at 987.
351. *Id.* at 987-88.
352. 571 F.2d 370 (7th Cir. 1978).
353. Smith was acquitted of the state charges. *Id.* at 372-73.
354. *Id.* at 372. Seven other federal circuits have approved this standard. United States v. Manuszak, 532 F.2d 311 (3d Cir. 1976); United States v. Strada, 503 F.2d 1081 (8th Cir. 1974); United States v. Carrion, 457 F.2d 808 (9th Cir. 1972); United States v. Bryant, 431 F.2d 425 (5th Cir. 1970); United States v. Nagelberg, 413 F.2d 708 (2d Cir. 1969), *cert. denied*, 396 U.S. 1010 (1970); United States v. Cates, 402 F.2d 473 (4th Cir. 1968); Yates v. United States, 308 F.2d 737 (10th Cir. 1962).
355. 571 F.2d at 372-73 (citing Morrissey v. Brewer, 408 U.S. 471 (1972)).
356. 563 F.2d 871 (7th Cir. 1977).

parole revocation hearing was unreasonable, and ordered the parolee's immediate release.[357] The Seventh Circuit noted that the district court properly applied the rule, as enunciated in *United States ex rel. Hahn v. Revis*,[358] and *Johnson v. Holley*,[359] that an irrebutable presumption of prejudice arises from a delay of more than three months, and requires the prisoner's revocation and release.

However, the Seventh Circuit abrogated the *Hahn* and *Johnson* rule in *United States ex rel. Sims v. Sielaff*,[360] in light of the Supreme Court's decision in *Moody v. Daggott*.[361] In reviewing the facts of *Bryant*, the court found that relief was not warranted. Specifically, the court noted that Bryant was afforded a preliminary hearing three days after the parole violation warrant was executed.[362] The prisoner admitted violating the conditions of his release, waived appointment of counsel, and requested that a parole revocation proceeding be held after his arrival at the designated institution.[363] The court noted that delays far in excess of 125 days had passed muster under *Barker v. Wingo*.[364] The court also found it significant that there was no showing that the delay had prejudiced the prisoner.[365] Finally, the *Bryant* court pointed out that the Parole Commission and Reorganization Act of 1976 requires that hearings be held within three months for individuals in Bryant's position.[366] The sponsors of the bill stated that the proper remedy for failure to meet the deadline would be to compel the decision and not to

357. *Id.* at 871.

358. 520 F.2d 632 (7th Cir. 1975), *vacated*, 560 F.2d 264 (7th Cir. 1977). A federal parolee serving time on a state sentence based on conduct occurring during his parole, against whom a federal parole violation warrant has been lodged with the state prison authorities, has a right to a reasonably prompt disposition of the parole violation charge.

359. 528 F.2d 116 (7th Cir. 1975). The court held that questions relating to the delay in holding the parole revocation hearing and the necessity for counsel at that hearing depended on facts not inquired into by the district court. Therefore, the Seventh Circuit court remanded the case, commenting that unless some substantial part of the four-month delay in holding the petitioner's revocation hearing was found to be attributable to the petitioner, the delay was unreasonable. *Id.* at 119.

360. 563 F.2d 821 (7th Cir. 1977).

361. 429 U.S. 78 (1976). The *Moody* Court held that a federal parolee, imprisoned for federal crimes committed while on parole and clearly constituting parole violations, was not constitutionally entitled to an immediate parole revocation hearing, where a parole violator warrant was issued but not executed.

362. 563 F.2d at 872.

363. *Id.*

364. 407 U.S. 514 (1972). The *Sims* court held that the standards of *Barker* are to be used in determining whether a prisoner's right to a speedy trial has been violated. In *Barker*, the United States Supreme Court held that a defendant's constitutional right to a speedy trial cannot be established by any inflexible rule, but can be determined only on an ad hoc balancing basis, in which the conduct of the prosecution and that of the defendant are weighed. The court should assess such factors as the length of and reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.

365. *Id.*

366. 18 U.S.C. §§ 4201-4218 (Supp. 1977).

release the prisoner.[367]

HABEAS CORPUS AND PRISONERS' RIGHTS

The Court of Appeals for the Seventh Circuit considered several issues relating to the constitutional rights of prisoners. One of the more significant cases decided in this area, *Lono v. Fenton*,[368] resulted in an *en banc* decision reversing an earlier panel decision. Kenneth Lono was a state prisoner who was transferred to federal custody pursuant to section 5003 of title 18 of the United State Code.[369] Lono argued that section 5003 authorizes such transfers only upon a showing that the prisoner is in need of specialized treatment unavailable in the state system. Lono also contended that due process requires a hearing on that question before any administrative transfer.[370]

The Seventh Circuit panel, in an opinion written by Judge Bauer,[371] held that section 5003 does not limit transfer of state prisoners into federal custody to those in need of specialized medical care or rehabilitative treatment. The case was reheard *en banc*, and a majority of the Seventh Circuit, speaking through Judge Wood, construed the legislative history of section 5003 to permit transfers of state prisoners to federal custody only upon a showing that the prisoner is in need of specialized treatment unavailable in the state system.[372] The majority also held that due process required that Lono be accorded a hearing on the issue of transfer.[373]

The dissenting members of the *Lono* court[374] argued that the majority was straining to find language limiting such transfers. For example, the dissenters argued that the requirement that the director of the Bureau of Prisons certify the availability of "proper and adequate treatment facilities and personnel"[375] should not have been construed as a substantive limitation. The dissent noted that there was an apparent discrepancy between the statutory language and the legislative his-

367. 563 F.2d at 872.
368. 581 F.2d 645 (7th Cir. 1978).
369. 18 U.S.C. § 5003 (1976) provides, in pertinent part:
(a) The Attorney General, when the Director shall certify that proper and adequate treatment facilities and personnel are available, is hereby authorized to contract with the proper officials of a State or Territory for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or Territory.
370. 581 F.2d at 646.
371. Lono v. Fenton, No. 77-1141 (7th Cir. Feb. 21, 1978). Judge Wood dissented.
372. 581 F.2d at 646.
373. *Id.*
374. Judges Bauer, Pell and Sprecher dissented.
375. 581 F.2d at 649.

tory only because the committee reports were more concerned with explaining the need for the legislation than examining its substance.[376] The dissent also pointed out that the majority's construction of the statute, some twenty-five years after enactment, jeopardized longstanding contractual relationships with many states.[377]

In 1973, the Court of Appeals for the Seventh Circuit recognized that prisoners have due process rights of access to the courts.[378] Recently, in *Ford v. Schmidt*,[379] the court considered whether the regulations of the Wisconsin State Prison violated the prisoners' right of access. The prison maintained a "no passing" rule which prohibited inmates from passing property to one another without authorization.[380] A prisoner had attempted to mail legal papers using another prisoner's mail coupon. The Seventh Circuit held that the "no passing" rule was reasonable and did not unduly interfere with the prisoner's right of access to the courts.[381]

In *Ford v. Caballo*,[382] a case arising out of *Schmidt*, the issue was whether the State of Wisconsin was entitled to reimbursement by the United States for the costs of transporting and guarding the plaintiff prisoner between state and federal custody. When the prisoner Ford initiated civil suit, the district court had issued a writ of habeas corpus ad prosequendum[383] directed to both the prison warden and the United States Marshall. The Marshall advised the State of Wisconsin that the United States would not transport the prisoner.[384]

Following the trial, the state sought to recover its costs. The district court denied the request, on the grounds that *Moeck v. Zajackowski*[385] had previously held that the state was not entitled to compensation for transporting prisoners. The Seventh Circuit reversed the district court's decision, holding that *Moeck* stood for the proposition that Wisconsin could not transport state prisoners to state civil trials and refuse to do so for federal prisoners.[386]

The *Caballo* court concluded that the district court had jurisdic-

376. *Id.*
377. *Id.*
378. Knell v. Bensingor, 489 F.2d 1014 (7th Cir. 1973).
379. 577 F.2d 408 (7th Cir. 1978).
380. *Id.* at 409.
381. *Id.* at 410.
382. 577 F.2d 404 (7th Cir. 1978).
383. Habeas corpus ad prosequendum is a writ which issues when it is necessary to remove a prisoner in order to prosecute in the proper jurisdiction wherein the act was committed. State *ex rel.* Deeb v. Fabisinski, 111 Fla. 454, 152 So. 207, 210 (1933).
384. *Id.* at 405-06.
385. 541 F.2d 177 (7th Cir. 1976).
386. 577 F.2d at 406.

tion under the All Writs Act[387] to issue the writ of habeas corpus requiring the state prisoner's presence. However, the court noted that the Supreme Court had held in *United States v. New York Telephone Co.*[388] that federal courts could not impose burdens on third parties without limit: "Unreasonable burdens may not be imposed."[389] The Seventh Circuit went on to conclude that it was an abuse of discretion to refuse the state's request for reimbursement of the costs of carrying out the district court's order.[390]

CONCLUSION

The United State Court of Appeals for the Seventh Circuit addressed numerous criminal procedure issues during its past term. Because of the great numbers of criminal cases which are customarily presented to the court, it is rare that truly novel issues are addressed. The court's work on the myriad issues that it did address was of commendably high quality and should be praised.

The court's greatest challenge in the years ahead will involve such areas as further interpretation of the Supreme Court's decisions in *Stone v. Powell*[391] and *Wainwright v. Sykes*,[392] and statutory interpretation of acts such as those permitting electronic surveillance and providing for speedy trials. It can be expected that the Seventh Circuit will continue to guide the development of the law in criminal procedure with its detailed interpretations of the issues presented.

387. 28 U.S.C. § 1651(a) (1976) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

388. 434 U.S. 159 (1977).
389. *Id.* at 172.
390. 577 F.2d at 408.
391. 428 U.S. 465 (1976).
392. 433 U.S. 72 (1977).